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No. 85-1403

In the Supreme Court of the United States

OCTOBER TERM, 1985

KANSAS GAS AND ELECTRIC COMPANY,
Petitioner,

vs.

WILLIAM E. BROCK,
Secretary of Labor,
Respondent,

and

JAMES E. WELLS, JR.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITIONER'S REPLY TO BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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ARGUMENT

The Solicitor General's statements concerning the Fifth Circuit's failure to consider the legislative history of the Energy Reorganization Act (ERA), 42 U.S.C. §5851(a), in *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984), are not correct and compel Petitioner to submit this reply. As anyone can discern from the Fifth Circuit's opinion and as the Department of Labor specifically should know from its participation in *Brown & Root*, the Fifth Cir-

cuit was fully aware of the legislative history and of the arguments of both the employer and the government concerning that history.

Although conceding a conflict among the circuits on the question presented for review, the Solicitor General incorrectly asserts in his Brief in Opposition:

> "[T]he legislative history is so convincing that we are confident that when it is brought to the Fifth Circuit's attention - *as it was not before* - *Brown & Root* will be set aside." (Solicitor's Brief, p. 6, emphasis supplied.)
>
> * * *
>
> "The Fifth Circuit panel that decided *Brown & Root* was not presented with the exposition of the highly relevant legislative history described at pages 7-14, *supra*, and consequently misinterpreted the legislative history (747 F.2d at 1033-1034)." (Solicitor's Brief, p. 15.)

The Solicitor General then suggests, in effect, that the Fifth Circuit be given an opportunity to "reconsider" its decision in some later case (Solicitor's Brief, p. 16): a position that is not only presumptuous but also curious in light of the government's decision not to seek reconsideration, hearing en banc, or further review of *Brown & Root*.

The following demonstrate the Fifth Circuit's consideration of the legislative history:

1. The *Brown & Root* opinion expressly states that the court considered the legislative history. The opinion quotes from all of the key legislative documents, the Conference Committee Report, the Senate Report and the legislative debates, and concludes that "[t]he Secretary's interpreta-

tion of section 5851 is unsupported by the language, legislative history, structure, or purposes of the ERA." *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029, 1036-37 (5th Cir. 1984).

2. Counsel for Brown & Root, Inc. have advised Petitioner that every element of legislative history cited by the Solicitor General in his opposition before this Court was addressed by Brown & Root and the government in their briefs before the Fifth Circuit.

3. At the time of its decision in *Brown & Root*, the Fifth Circuit had before it and considered the opinion of the Ninth Circuit in *Mackowiak v. University Nuclear Systems*, 735 F.2d 1159 (9th Cir. 1984). The Ninth Circuit specifically cited and relied upon the legislative history and *Phillips v. Interior Board of Mine Operations Appeals*, 500 F.2d 772 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 938 (1975), which the Solicitor General now argues the Fifth Circuit must have overlooked. 735 F.2d at 1162-63.

Contrary to the Solicitor General's incorrect assertions, the Fifth Circuit fully understood and considered the arguments concerning the legislative history. The Fifth Circuit simply and properly rejected the government's interpretation of that history. The Fifth Circuit's decision is correct and no reason exists for it or any other circuit to reach a contrary conclusion.

Notwithstanding the Solicitor General's speculation that the issue presented in this petition is not important to very many cases, his concession that the circuits are in conflict emphasizes the potential for confusion over the applicable law as new cases wind through the administrative processes and the courts. Indeed, the Solicitor General notes that there were 79 ERA complaints filed

nationwide in fiscal year 1985. As a practical matter, only resolution by this Court will resolve the clear and unmistakable conflict among the circuits and give appropriate guidance to the affected employers, employees, administrative law judges, and governmental agencies.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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